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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1667

UNITED STATES OF AMERICA,

Petitioner,

v.

PETER POMPONIO, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM IN OPPOSITION

LEONARD B. BOUDIN
VICTOR RABINOWITZ
Attorneys for Respondents
Peter Pomponio and Paul Pomponio
30 East 42nd Street
New York, N.Y. 10017

LEX PRINTING CO., INC., 451 GREENWICH ST., N.Y. 10013—966-4300

INDEX

Cases: PAGE

American Construction Co. v. Jacksonville, T & K.W. Ry. Co., 148 U.S. 372 7

Avco Corp. v. Aero Lodge 735, 390 U.S. 557 6

Cox v. Louisiana, 379 U.S. 559 7

Miller v. United States, 120 F.2d 968 (10th Cir. 1941) 7

Monrosa, The v. Carbon Black, Inc., 359 U.S. 180 9

Potter v. United States, 155 U.S. 438 7

Raley v. Ohio, 360 U.S. 423 7

Spies v. United States, 317 U.S. 492 .....4, 5, 6, 7

United States v. Bishop, 412 U.S. 346 .....5, 6, 7

United States v. Hawk, 497 F.2d 365 (9th Cir. 1974) cert. den., 419 U.S. 838 .....4, 5, 6

United States v. Johnston, 268 U.S. 220 9

United States v. Malinowski, 472 F.2d 850 (3d Cir. 1973) cert. den. 411 U.S. 970 6

United States v. Matosky, 421 F.2d 410 (7th Cir. 1970) cert. den. 398 U.S. 904 7

United States v. McCorkle, 511 F.2d 482 (7th Cir. 1975) cert. den. 423 U.S. 826 .....4, 5, 6

United States v. Mitchell, 495 F.2d 285 (4th Cir. 1974) 3

United States v. Murdock, 290 U.S. 389 ..... 5, 7

United States v. Pennsylvania Chem. Corp., 411 U.S. 655 7

United States v. Pohlman, 522 F.2d 974 (8th Cir. 1975) cert. den. 423 U.S. 1049 .....4, 5, 6

PAGE

United States v. Pomponio, 517 F.2d 460 (4th Cir. 1975) 3

United States v. Louis J. Pomponio, Jr., 511 F.2d 953 (4th Cir. 1975) 3

United States v. Pomponio, 528 F.2d 247 (4th Cir. 1975) 3

United States v. Smith, 487 F.2d 329 (9th Cir. 1973) cert. den. 416 U.S. 989 7

Statutes:

18 U.S.C. 1952 3

26 U.S.C. 7206 (1) 1, 4, 5

26 U.S.C. 7203 ..... 4, 5

Rules of the Supreme Court:

Rule 19(b) 8

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MEMORANDUM IN OPPOSITION

On November 14, 1973, the Grand Jury in the Eastern District of Virginia indicted respondents Peter Pomponio and Paul Pomponio, their brother, Louis J. Pomponio, Jr., and respondent Charles J. Piluso, Jr. (*United States* v. *Pomponio, et al.*, 73-304, E.D. Va.) charging them with willfully making and subscribing false tax returns for the years 1969 through 1971 in violation of 26 U.S.C. 7206 (1).

The indictment set forth the same factual situation against each of the defendants. It charged that the defendants had improperly treated amounts paid to them by the Pomponio family corporations as loans rather than dividends, and that they had improperly deducted corporate losses as partnership losses.

Following the severance of Louis J. Pomponio, Jr. by reason of illness,[1] respondents were tried before a jury in March, 1974 (Oren R. Lewis, Jr., Judge).

The case presented sharply contested issues of fact, with the government's principal witness supporting respondents' position that the disputed payments were loans which they intended to repay (Tr. 316 *et seq.*).[2] The trial court excluded evidence showing that respondents had relied upon the Internal Revenue Service's acquiescence in their treatment of similar payments as loans in their tax returns from 1964 through 1966 (Tr. 349 *et seq.*, 611, 612).

The trial court also declined to charge the jury that (i) bad faith or evil motive is an element of the offense and (ii) the jury must acquit if the respondents reasonably believed that they had received loans and incurred losses. (App. 3A).

The Court of Appeals found error in both these refusals and remanded the case for a new trial. "We are of opinion," it said, "that the court's instruction as to motive was incorrect *as used in the case before us*, and . . . it erred in refusing to give a requested instruction on good faith belief of the defendants as to the nature of the loans especially and the deductibility of the partners losses." (App. 3A) (emphasis supplied).

The Court of Appeals found it unnecessary to resolve the other issues raised by respondents. These included, *inter alia*, (1) the failure to conduct a proper voir dire of

[1] Louis J. Pomponio, Jr., upon his recovery, was subsequently tried and acquitted by a jury. (*United States* v. *Pomponio*, 73-304, E.D. Va.)

[2] Tr. refers to the transcript of trial proceedings; Pet. to the petition for certiorari; App. to the opinion of the Court of Appeals attached to the petition; and Pil. Br. to respondent Piluso's opposition to the petition.

the jury to determine and correct the effect of massive publicity directed against respondents immediately prior to the trial;[3] (2) the exclusion of conversations between respondents' representative and the Internal Revenue Service with respect to the respondents' practices of earlier years bearing upon their good faith; (3) the trial judge's excessive and one-sided examination of witnesses and other undue intervention in the trial; and (4) his unfair and inaccurate summary of the evidence.[4]

The immediate question is whether this Court should undertake to determine, at an interlocutory stage of the case, the propriety of jury instructions within the context of a long record, where the government has the opportunity to try the respondents again, undoubtedly before a different trial judge.[5]

[3] This and similar publicity led to the reversal of respondents' convictions in a related stock fraud case tried in January, 1974 before the same judge, *United States* v. *Pomponio*, 517 F.2d 460 (4th Cir. 1975). The same issue is now pending before the Court of Appeals for the Fourth Circuit upon an appeal by Louis J. Pomponio, Jr. from a conviction under 18 U.S.C. 1952 (*United States* v. *Louis J. Pomponio, Jr.*, No. 75-2287), following the reversal by the Court of Appeals of a district court order granting a motion in arrest of judgment. (*United States* v. *Louis J. Pomponio, Jr.*, 511 F.2d 953 (4th Cir. 1975).

[4] Other issues presented to and not decided by the Court of Appeals included the trial court's prejudicial delay in severing a conspiracy count, its admission into evidence of matters possibly relevant to that count but not to the remaining ones, the prejudicial behavior of the United States Attorney's office before the grand jury and related matters.

[5] In at least three cases before the same trial judge arising out of the multi-faceted government attack upon the respondents, their employees and associates, the Court of Appeals reversed convictions for inadequacy of the charge or inadequacy of the voir dire of the petit jury, *United States* v. *Pomponio*, 517 F. 2d 460 (4th Cir. 1975); *United States* v. *Pomponio*, 528 F.2d 247 (4th Cir. 1975 (the instant case), and *United States* v. *Mitchell*, 495 F. 2d 285 (4th Cir. 1974). More recent indictments were assigned to another judge in the Eastern District of Virginia.

Reasons for Denying the Petition

1. There is no conflict between the decision of the Court of Appeals in this case and the decisions of other courts of appeals concerning the need for a jury instruction on "bad purpose or evil motive". The government has cited no appellate court decision in a criminal prosecution under 26 U.S.C. 7206 (1), the statutory provision which concerns us here, in conflict with the decision sought to be reviewed.

(a) Each of the three cases relied upon by the government was a criminal prosecution under a different statute, 26 U.S.C. 7203, for willful failure to file tax returns. *United States* v. *Hawk*, 497 F.2d 365 (9th Cir. 1974) *cert. den.*, 419 U.S. 838; *United States* v. *McCorkle*, 511 F.2d 482 (7th Cir. 1975), *cert. den.*, 423 U.S. 826; *United States* v. *Pohlman*, 522 F.2d 974 (8th Cir. 1975) *cert. den.*, 423 U.S. 1049.

The quantum of proof is much higher in the case of an alleged false return, as in the present case, in violation of 26 U.S.C. 7206, than where the taxpayer has failed to file a return in violation of 26 U.S.C. 7203.[6] The § 7203 cases present no dispute as to the essential fact, non-filing, and the claims of justification are relatively simple. In contrast, the § 7206 cases require a jury determination of deliberate falsity in the content of the returns. In the present case, for example, there are difficult questions as to whether the monies received were loans or income, the nature of the respondents' past practices and their reasonable belief that those practices were lawful in the light, *inter alia*, of the

[6] The government correctly admitted the difference in its brief in the Court of Appeals in *United States* v. *Hawk*, *supra* (see Pil. Br., pp. 22-23). An analogous distinction between two other quite similar tax provisions was noted by Mr. Justice Jackson in *Spies* v. *United States*, 317 U.S. 492, 497-498.

government's past acceptance of those practices.[7] As the Court said in *Spies* v. *United States*, 317 U.S. 492, 498:

> "[w]e would expect willfulness in such a case to include some element of evil motive and want of justification in view of all the financial circumstances of the taxpayer."

(b) The good motivation instructions sought by the defendants in the § 7203 cases relied upon by the government were very different from that directed by the Court of Appeals in this case. In *McCorkle* the defendant sought an instruction which would have required evidence of "an intent to defraud" (*supra* at 483); *Hawk* had no claimed factual basis for the instruction he requested except for the defendant's "mental block" (*supra* at 366); *Pohlman* also invoked "personal problems" (*supra* at 976), which made the requested instruction equally baseless. In contrast, the instruction sought here has a rational application to the financial and bookkeeping practices which were the subject of extended testimony.

(c) Even if we were to treat § 7203 cases as presenting problems identical with § 7206 cases, there is no substantial disagreement among the circuits as to the basic requirement of willfulness in instructions. All of the appellate courts follow, with variations of language, this Court's holding in *United States* v. *Bishop*, 412 U.S. 346, 361, that "[U]ntil Congress speaks otherwise, we therefore shall continue to require, in both tax felonies and tax misdemeanors that must be done 'willfully,' the bad purpose or evil motive described in *Murdock, supra.*" (*United States* v. *Murdock*, 290 U.S. 389.) The precise formulation of the

[7] The complex factual situation is reflected in the government's excerpt from the 41-page charge to the jury (App. 10-11A, Tr. 1091-1131).

charge will, of course, vary with the facts and the lower appellate courts have recognized that the differences in formulation may be merely semantic.[8] More important, as Mr. Justice Jackson wrote for this Court, "willful . . . is a word of many meanings, its construction often being influenced by its context". *Spies* v. *United States, supra* at 497. Indeed, the court below limited its criticism of the instruction to the facts of this case saying that the instruction was insufficient "as used in the case before us." (App. 3A).

Accordingly, the case does not present a clear conflict between the decision below and those of the other courts of appeals which would require resolution by this Court. *Avco Corp.* v. *Aero Lodge 735,* 390 U.S. 557, 559.

2. The Court of Appeals in this case correctly read *Bishop* as requiring "a finding of a bad purpose or evil motive" (App. 5A). Contrary to the government's implication (Pet. 11) the Court of Appeals did not employ the term "bad purpose or evil motive" as encompassing matters *dehors* the offense charged. The case is unlike those cases cited by the government arising from political objections to the war, *United States* v. *Malinowski,* 472 F.2d 850

[8] In *United States* v. *Hawk,* 497 F.2d 365, 369 (9th Cir. 1974) *cert. den.* 419 U.S. 838, the Court of Appeals found that "the use of such terms ["as evil motive"] is often helpful" adding that "all that is required are instructions which communicate the proper notion of specific intent in understandable terms" and that "[t]he instructions here were adequate to that purpose." *Ibid.* In *United States* v. *McCorkle,* 511 F.2d 482, 485 (7th Cir. 1975) the court merely held that "bad purpose" and "evil motive" was a "convenient method of referring to the longer definition of 'willfully' . . ." *Id.* at 485. In *United States* v. *Pohlman,* 522 F.2d 974, 977 n. 2 (8th Cir. 1975) *cert. den.* 423 U.S. 1049, the court recognized the possibility of alternative formulations, and, while affirming the judgment of conviction, rewrote the required instruction for future trials.

(3d Cir. 1973) *cert. den.* 411 U.S. 970; from protests against withholding taxes from workingmen's wages, *United States* v. *Smith,* 487 F.2d 329 (9th Cir. 1973) *cert. den.* 416 U.S. 989; or to avoid detection of a fugitive's whereabouts, *United States* v. *Matosky,* 421 F.2d 410 (7th Cir. 1970) *cert. den.* 398 U.S. 904. Instead, the Court of Appeals used the term "evil motive" in this case as did this Court in *Bishop* when it referred to "evil motive and want of justification in view of all the financial circumstances of the taxpayer" (412 U.S. at 360) quoting from *Spies* v. *United States,* 317 U.S. at 498. It was for this reason that the past practices of the respondents and the government's acquiescence in those practices[9] were relevant to show respondents' good faith belief in their description of the monies involved as loans.[10] See *United States* v. *Murdock,* 290 U.S. 389.

There is no occasion here for requesting this Court to repeat in this case what it said about willfulness only four terms ago in *Bishop* and earlier in *Spies* v. *United States, supra,* and even earlier in *United States* v. *Murdock, supra.*

4. An additional reason for denying the petition for certiorari, even if a conflict of circuits had been shown, is that the judgment of reversal is interlocutory from any realistic point of view and as such is not presently entitled to this Court's review. See *American Construction Co.* v. *Jacksonville, T. & K.W. Ry. Co.,* 148 U.S. 372, 384. It is unlikely that a decision by this Court could end this litigation since the Court of Appeals upon remand would

[9] *Potter* v. *United States,* 155 U.S. 438; *Miller* v. *United States,* 120 F.2d 968 (10th Cir. 1941).

[10] The government's acquiescence sought herein to be established (Tr. 349-392, 407, 446, 611-612) would also be the basis for the application of equitable estoppel principles. *United States* v. *Pennsylvania Chem. Corp.,* 411 U.S. 655, 674; *Raley* v. *Ohio,* 360 U.S. 423; *Cox* v. *Louisiana,* 379 U.S. 559.

be required to consider the other substantial issues raised by respondents. On the other hand, if the case is remanded to the district court for retrial, as directed by the Court of Appeals, many of the other issues may be resolved by more adequate instructions and more satisfactory trial procedures before another trial judge.

5. The interlocutory aspect aside, this Court does not sit, except in the most unusual of cases which this does not appear to be, to review upon application of the government a ruling by a Court of Appeals upon a jury instruction in a case remanded for a new trial to the district court. Review of such instructions is peculiarly a function of the lower appellate courts whose normal responsibility is to review trial records. Indeed, this allocation of power to the courts of appeals is reflected in the variations of language used by the district and appellate courts in their respective circuits in the very tax cases relied upon by the government (*supra*, pp. 4, 7).

6. Review should be denied because of the existence of an independent ground for the decision below, which the government concedes is not an appropriate ground for certiorari (Pet. 12). This is the court's alternative reason for reversal, namely, that the trial court had erred in failing to charge the jury as to "good faith belief" (App. 3A). The government's claim that the district court did in fact give such an instruction[11] is not a matter upon which this Court would rule, it being outside the scope of Rule 19(b) of the Rules of this Court.

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[11] This Court is hardly in a position to decide whether the "instruction", as the government suggests (concerning the loan and advances) "was more than sufficient" (Pet. 13) or whether the instructions as to the partnership loss "adequately advised the jury" (*Ibid.*) concerning guilty knowledge, upon a twelve hundred page record and numerous exhibits.

The Court of Appeals must have a wide area of discretion in reviewing such matters as jury instructions in the absence of a conflict between circuits or a significant constitutional issue, particularly where the government's claim must be assessed in the context of a long, detailed and controversial record.[12] This Court does not grant certiorari where there is a non-reviewable alternative ground for the decision below. *The Monrosa* v. *Carbon Black, Inc.*, 359 U.S. 180.

7. Respondents adopt in their entirety the arguments made by the respondent Piluso[13] in his opposition to the petition for certiorari.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

LEONARD B. BOUDIN
VICTOR RABINOWITZ
Attorneys for Respondents
Peter Pomponio and Paul Pomponio

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New York, N.Y.

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[12] See *United States* v. *Johnston*, 268 U.S. 220, 227.

[13] We particularly call the Court's attention to the instructions tendered by that respondent, adopted by the Pomponio respondents at the trial and rejected by the trial court (Pil. Br. 2a-6a).